Lifemark Hospitals of Texas, Inc. d/b/a Mid-Jefferson County Hospital *and* Service Employees International Union, Local 706, AFL-CIO, Petitioner. Cases 23-RC-4937 and 23-RC-4938

December 29, 1981

DECISION AND DIRECTION

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On April 7, 1981, Hearing Officer Ruben R. Armendariz issued a report recommending disposition of challenges and objections to the elections held on December 23, 1980.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's findings and recommendations, as modified below.[2]

As noted above, the tally of ballots reveals that 17 ballots were challenged during the election involving Service Employees International Union, Local 706, AFL-CIO. These challenges included challenges by the Employer to the ballots cast by Marilyn Kimmey, Susan Breaux, Carol Garcia, Glennie Bailey, Jill Benoit, and Nora Varando. In his Report and Recommendations on Objections and Challenges, the Hearing Officer, finding that these individuals were employed as casual employees, sustained the challenges to their ballots.[3] Petitioner filed timely exceptions to the Hearing Officer's report, contending that five of the individuals named above were regular employees and the challenges to their ballots should be overruled.[4] The Hearing Officer based the finding that the employees were casual employees on two facts: first, the employees are not required to work a specific schedule of hours but rather have the discretion to accept or reject assignments without discipline; and, second, the individuals in question do not accrue benefits by longevity as do the regular part-time employees.

We have held in the past that the ability to reject work when offered and the receipt of identical benefits are not determinative of an individual's employment status so as to exclude the individual from the unit as a casual employee. *Leaders-Nameoki, Inc.*, 237 NLRB 1269 (1978), and *F. P. Packaging, Inc.*, 236 NLRB 239 (1978). Rather, the individual's relationship to the job must be examined: whether the employee performs unit work and whether the employer has a sufficient regularity of work to demonstrate a community of interest with the remaining employees in the unit regarding wages, hours, and working conditions. *System Auto Park & Garages, Inc.*, 248 NLRB 948 (1980), and *F. P. Packaging, supra*. In the instant case, the record reveals that the employees in question worked a substantial number of hours on a regular basis and performed the same work under the same conditions and supervision as other unit employees. Thus, these individuals have a substantial community of interest with the other members of the unit regarding wages, hours, and working conditions. We conclude, therefore, that Kimmey, Breaux, Garcia, Bailey, and Varando were, at the time of the December 23, 1980, election, regular part-time employees eligible to vote in the election, and we shall overrule the challenges to their ballots. Accordingly, we shall order the Regional Director to open and count the ballots of Marilyn Kimmey, Susan Breaux, Carol Garcia, Glennie Bailey, and Nora Varando. In his report, the Hearing Officer also found that the Employer, through Supervisor Barbara Roberts, engaged in coercive interrogation

[1] The elections were conducted pursuant to a Stipulation for Certification Upon Consent Election. The tallies of ballots show the following results:

Unit "A"—Professional Employees (the Inclusion Question): 10 for and 8 votes against inclusion with non-professional employees; there was 1 challenged ballot, which is insufficient to affect the results on the inclusion question.

Unit "B"—Professional and Non-Professional Employees: 82 for and 87 votes against the Petitioner; and there were 17 challenged ballots, a sufficient number to affect the results.

[2] The Employer and the Petitioner have excepted to various credibility findings of the Hearing Officer. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *The Coca-Cola Bottling Company of Memphis*, 132 NLRB 481, 483 (1961), and *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find insufficient basis for disturbing the credibility resolutions in this case.

[3] In support of the Hearing Officer's finding that six employees should be excluded from the unit, the Employer further contends that the employees in question are not covered by the stipulation, defining the appropriate unit, which was entered into by the parties and approved by the Regional Director. It is well-established Board law that, in stipulated unit cases, the Board's function is to ascertain the parties' intent with regard to the disputed employees and then to determine whether such intent is inconsistent with any statutory provision or established Board policy. *The Tribune Company*, 190 NLRB 398 (1971). In the instant case, the stipulation clearly enumerates that "regularly scheduled part-time employees" in various positions are to be included in the unit. On its face, the stipulation thus includes those part-time employees who work according to a regular schedule. The Employer contends that the employees in question do not fall within the terms of the stipulation because they are not required to work according to a regular schedule. Contrary to the Employer's contention, however, the record indicates that the employees in question regularly receive a schedule of when they are to work for at least some of their hours. The fact that they may refuse to work the scheduled hours or may be called in to work on days they are not scheduled does not outweigh the fact that a portion of their hours are worked according to a schedule. We therefore conclude that the intent of the parties, as evidenced by the stipulation on its face, was to include the employees in question in the unit.

[4] In the absence of exceptions thereto, we adopt *pro forma* the Hearing Officer's recommendation that the challenge to the ballot of Jill Benoit be sustained.

of employee Cheryl Shockey. The Employer excepted to the Hearing Officer's conclusion that these acts interfered with the conduct of the election and therefore the election should be set aside. We agree with the Hearing Officer. In so doing, however, we rely not only on the above-noted misconduct of Supervisor Roberts, but also on the fact that, based on the credited testimony of Shockey, Supervisor Roberts engaged in additional misconduct. This misconduct occurred at a meeting of the entire department, held by Roberts, during which she stated that, if the Union won the election, the employees would have to start punching a timeclock and take breaks at certain specified times during the day. These remarks—directed to the entire department—constituted a threatened loss of privileges and changes in working conditions in the event of a union victory. This conduct, together with the coercive interrogation of Shockey, clearly warrants setting aside the election and directing that a second election be held, if Petitioner fails to receive a majority of the valid ballots cast in the election conducted on December 23, 1980.

DIRECTION

It is hereby directed that the Regional Director for Region 23, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision and Direction, open and count the ballots of:

Terrance Barcus	Carol Garcia
Marilyn Kimmey	Addie May Murphy
Susan Breaux	Mary Newton
David Hodgson	Glennie Bailey
Gail Landry	Timmy Williams
Betty Sedtal	Nora Varnado

and, thereafter, prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots. In the event that the revised tally of ballots shows that Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue the appropriate certification of representative.

In the event that the revised tally of ballots shows that Petitioner has not received a majority of the valid ballots cast, a second election by secret ballot shall be conducted among the employees in the unit found appropriate, at such time as the Regional Director deems appropriate. The Regional Director for Region 23 shall direct and supervise the election, subject to the Board's rules. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of issuance of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have permanently replaced.[5] Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Service Employees International Union, Local 706, AFL-CIO.

[5] [*Excelsior* footnote omitted from publication.]